AN ENGLISH WORKMAN'S REMEDIES FOR INJURIES RECEIVED IN THE COURSE OF HIS EMPLOYMENT, AT COMMON LAW AND BY STATUTE.

In Michaelmas Term, 1837, there came before the Court of Exchequer a case in which a butcher's assistant had recovered a verdict against his master for £100 for a broken thigh. He had been directed by his master to deliver some meat in a van conducted by a fellow servant, and the van had broken down owing to its being overloaded. On a motion to arrest judgment, the Court of Exchequer held that there must be judgment for the defendant on the ground that "from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant arising from any vice or imperfection unknown to the master in the carriage or in the mode of loading and conducting it." This was the leading case of *Priestley* v. *Fowler*.[1] It really decides no more than that a master does not warrant the fitness of his carriage for carrying his servants; but in their considered judgment the Court suggested that if they held otherwise the master would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed, for that of the upholsterer for sending in a crazy bedstead, or of the butcher in supplying the family with meat of a quality injurious to the health, etc. It would hardly be suggested now that all these consequences would follow, or that if they did, the result would be so terrifying as it appeared to the judges of the first year of the reign of Queen Victoria.

A dozen years later a similar question came before the same court in a case in which a servant of a railway company, traveling in a train in performance of his duty, was killed in a collision with another train, brought about by the negligence of other servants of the same company.[2] The court, in a considered judgment, held that the case was not distinguishable in principle from *Priestley* v. *Fowler,* and for the first time laid down broadly

[1](1837) 3 M. & W. 1.

[2]Hutchinson *v.* York, Newcastle & Berwick Ry. (1850) 5 Exch. *343.

what has since become known as the doctrine of Common Employment. They held that, where injury results to one of several servants employed by the same master from the negligence of another, the master is not generally responsible if he has selected persons of competent care and skill. And the reason for making this exception to the general rule of a master's liability for the negligence of his servants in the course of their employment was said to be that the servant "knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk." This rule was soon afterwards affirmed by the House of Lords in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. 266, and *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. 326, and is now firmly established as a fundamental doctrine of the common law.

Meanwhile this rule had been adopted by Chief Justice Shaw of Massachusetts[3] in a judgment which has been often referred to by English judges as containing the best exposition of the doctrine.[4]

In the earliest cases the injured man and the person by whose negligence he was injured were in the narrowest sense fellow workmen, *i. e.,* men in the same class of employment, and in later cases some attempt was made to limit the doctrine to such cases. In Scotland it was held that the rule did not apply when the negligence was that of some person to whom the employer had delegated his authority in regard to the management and control of his business or some part thereof. But all such distinctions were brushed aside by the House of Lords in *Wilson* v. *Merry,*[5] where it was held that the master performs his duty if he selects proper and competent persons to superintend his business for him, and, where he has done so, is not liable for their negligence by which a workman placed under their control is injured. The manager, superintendent or foreman is in common employment with the humblest workman, and the one cannot sue the master for injuries caused by the negligence of the other.

[3]Farwell *v.* Boston & Worcester R. R. (1842) 45 Mass. 49.

[4]See Lord Cranworth in Bartonshill Coal Co. *v.* Reid (1858) 4 Jur. N. S. 767; Sir Francis Jeune in The Petrel [1893] P. 320, 323; Sir Gorell Barnes in Young *v.* Hoffmann Mfg. Co. [1907] 2 K. B. 646, 653.

[5](1868) L. R. 1 H. L. Sc. 326.

As Kennedy, L. J., says in a later case:[6] "The master does not undertake to indemnify the servants against the consequences of the negligence of any person except himself." He does undertake to use reasonable care in the selection of competent fellow servants, and in keeping and having machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect, and in averting danger by causing such instruction to be given the servant in its use as is reasonably necessary where dangerous machinery is employed. There his duty ends.

The full development of this doctrine has established the following rules:

1. It is applicable although the servant who is injured and the workman injured are not equal in point of station or authority. So the captain of a ship and the sailors working under his orders are in common employment.[7]

2. It applies where the two men are employed in different departments of service, provided the conditions of service are such as to involve risk of injury to the one from the carelessness of the other. For instance, a carpenter employed by a railway company at work upon a station, who is injured by the negligence of porters employed in switching trains;[8] or a chorus girl at a theatre injured by the negligence of a scene shifter;[9] or a collier going home by train, injured by the negligence of a fellow servant, repairing a bridge under which the train passed.[10]

3. It does *not* apply when the injured man and the man who causes the injury, though engaged in common employment, are not servants of the same master—as when they are servants of different contractors engaged on the same building;[11] or employees of two different railway companies using the same station.[12]

4. It does not apply where, though the injured man and the man causing the injury are servants of the same master, they

[6]Young *v.* Hoffmann Mfg. Co. [1907] 2 K. B. 646, 657.
[7]Hedley *v.* Pinkney & Sons S. S. Co. [1892] 1 Q. B. 58.
[8]Morgan *v.* Vale of Heath Ry. (1865) L. R. 1 Q. B. *149.
[9]Burr *v.* Theatre Royal, Drury Lane [1907] 1 K. B. 544.
[10]Coldrick *v.* Partridge, Jones & Co. [1909] 1 K. B. 530.
[11]Johnson *v.* Lindsay & Co. [1891] A. C. 371.
[12]Swainson *v.* North-Eastern (1878) 1 Ex. D. 340.

are engaged in such different businesses or different departments that the one cannot be considered as having contracted to take the risk of the other's negligence. An illustration suggested is the case where a man carries on the business of a baker in one town and that of a brewer in another. The only reported English case is *The Petrel* [1893] P. 320, where the captain of a ship was injured by a collision on the high seas with another ship belonging to the same company. The owner of the two ships, who was the master of the injured man, and of the man by whose negligence the injury was caused, was held liable, since service on board the two ships was not regarded as common employment within the rule. A sailor signing to serve on ship A does not contemplate collision with ship B as a risk incidental to his employment in any greater degree than he contemplates the risk of collision with any other ship using the high seas.

The extensive application of the first and second of the above rules makes it, however, impossible for a workman to recover damages at common law against his master for injuries received in the course of his employment, unless he can prove personal negligence on the part of the master. Personal negligence may be established by proof that the master has not taken reasonable care to select competent servants,[13] or by proof that he has not taken reasonable care to provide and maintain a proper system of work, and premises, machinery and tools which are not dangerous.[14] But in large undertakings the employer generally deputes to superior servants the duty of engaging inferior servants and of supervising the system of work and the plant. machinery, etc., used in it; and if there is any negligence in any of these matters it is negligence of the superior servant, and the doctrine applies. The injured workman is then obliged to prove negligence on the part of the employer in engaging or continuing to employ the superior servants.[15] The workman does, however, get a chance when he can trace the accident to the neglect by the employer of some absolute statutory obligation, such as that of fencing dangerous machinery,[16] or of providing appliances of a

[13]See Tarrant *v.* Webb (1856) 18 C. B. *797, and Senior *v.* Ward (1859) 1 E. & E. 385.

[14]See Smith *v.* Baker & Sons [1891] A. C. 325; Williams *v.* Birmingham Battery & Metal Co. [1899] 2 Q. B. 338.

[15]See Wilson *v.* Merry (1868) L. R. 1 H. L. Sc. 326; Young *v.* Hoffmann Mfg. Co., Ltd. [1907] 2 K. B. 646.

[16]Groves *v.* Lord Wimborne [1898] 2 Q. B. 402.

special nature.[17] In the case of accidents resulting from the neglect of absolute duties of this kind, the employer cannot escape the liability by pleading that the failure to comply with the duty was due to the negligence of a servant who was in common employment with the injured man, and to whom the master had delegated the duty imposed upon him by the legislature. It is thus apparent that the larger the undertaking in which a man was employed, the smaller were his chances of a successful action against his employer. An employer of a few men makes himself personally responsible for the system, tools and appliances, and he personally engages foremen and has the means of knowing whether or not they are competent. In big concerns all these duties are deputed to managers or superintendents. The employer is removed by many grades from the workman, and the chance of proving personal negligence, unless it be in neglect of a positive statutory duty, is next to nothing.

The doctrine of common employment, though honored by generations of lawyers, must always have seemed highly artificial to laymen, as it resulted in hardship to the working classes. It is difficult to convince anyone not trained in the niceties of the law that when a railway guard is engaged he impliedly contracts to take the risk of negligence of a fellow workman, or that if he is injured by one of his own company's servants he has not as good a ground for claiming damages as he would have against another company if the injury happened by reason of the negligence of a servant of that company. The layman does not see that it is reasonable that if the guard and the signalman whose negligence causes the injury both have X. & Y. R. R. on their caps he has no remedy, whereas if the one has X. & Y. R. R. on his cap, and the signalman happens to have M. & N. R. R. on his, he can claim damages from the M. & N. Railroad.[18]

The first serious attempt to deal with this grievance was made by the Employers' Liability Act of 1880, introduced by the late Mr. Joseph Chamberlain, then president of the Board of Trade during Mr. Gladstone's government. It was the result of a compromise between the views of the workmen and those of the manufacturers, the support of both of whom was necessary to keep the government in power.

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[17]Watkins *v.* Naval Colliery Co., Ltd. [1912] A. C. 693.

[18]In England the servants of different railway companies are usually distinguished by the letters on the badges of their caps.

The scheme of the Act is to take from the master the defence of common employment in certain specified cases. It does not create a new cause of action, but merely says in effect that when a workman[19] to whom the Act applies brings an action against his master for negligence of the kind specified, the master shall not set up the defence of common employment, and shall be liable as if the injured man were not a fellow servant of the wrongdoer. Accordingly, to succeed in an action the workman must discharge as at common law the burden of proving negligence; and the master may set up all defences available at common law (such as contributory negligence, or *volenti non fit injuria*) except that of common employment.[20]

The doctrine of common employment is not abolished; and to shut out that defence the workman must prove that he is a workman of one of the classes to whom the Act applies, and that the negligence complained of is of the kind specified by the Act.

The workmen to whom the Act applies are those who fall within a somewhat cumbrous and arbitrary definition or description, including railway servants, laborers, artificers, miners, and other persons engaged in manual labor. It does not apply to clerks or domestic or menial servants. It is hardly necessary to say that when the Act came to be considered, some very fine distinctions were drawn between those who were and those who were not workmen within the definition of the Act. For instance, it has been held that a grocer's assistant, an omnibus conductor or a driver of a horse tram cannot claim the benefit of the Act; but that the driver of a motor bus may.[21]

The causes of injury to which the Act applies are specified with some precision. Among them is included the negligence of any person in the service of the employer who has charge or control of any signal points, locomotive, or train on any railway. All the other causes of injury specified involve negligence of the employer himself or of some servant to whom the employer has deputed duties of superintendence or oversight,—such as defects

[19]Or, in case of death of the workman, his personal representatives or dependents.

[20]See Thomas *v.* Quartermaine (1887) 18 Q. B. D. 685.

[21]Bound *v.* Lawrence [1892] 1 Q. B. 226; Cook *v.* North Metropolitan Tramways Co. (1887) 18 Q. B. D. 683; Morgan *v.* London General Omnibus Co. (1884) 13 Q. B. D. 832; Smith *v.* Associated Omnibus Co. [1907] 1 K. B. 916.

in the condition of the ways, works, machinery or plant due to the negligence of the employer or of someone entrusted with the duty of seeing that they are in proper condition, and obedience to orders given by some person in authority. In no case (except in the case of railways as above mentioned) is the employer made liable for collateral negligence of a workman in the same grade of employment as the injured man.

Actions brought under the Act must be begun in a County Court, and the amount of damages recoverable may not exceed the amount of three years' wages of the plaintiff, or of the deceased when his dependents sue in respect of his death.

The liability created by the Employers' Liability Act to some extent overlaps the common law liability. For instance, if an accident happens by reason of a defect in the condition of the ways, works, plant or machinery due to the personal negligence of the employer, the injured man may sue either at common law or under the Act. If he brings an action at common law he may proceed in the High Court and there is no definite limit to the amount of damages he may recover, but he runs the risk of being defeated by the defence of common employment if he fails to make out personal negligence. By going under the Act, he avoids this risk and the action may be brought in a County Court, even though he claims more than £100, which is the limit of jurisdiction of this court in a common law action.

The Employers' Liability Act achieved a large measure of success. But it had certain defects. In a vast number of cases the injured workman got substantial justice; but in many cases he failed, either because he could not bring himself strictly within the provisions of the Act, or for want of evidence to prove his case. Accordingly, an effort was made to provide a simple scheme of compensation to which every workman, injured in the course of his work, should be entitled as of right without resort to litigation. The first attempt was made by the Workmen's Compensation Act of 1897—again the handiwork of Mr. Joseph Chamberlain. It provided that whenever a workman (as defined by the Act) suffered personal injury by accident arising out of and in the course of his employment, his employers should be bound to pay him compensation upon a scale fixed by the Act. Any disputes as to liability for the amount of compensation payable were to be referred to arbitration, with a right of appeal on points of law to the Court of Appeal, and thence to the House of Lords. It

was confidently hoped that litigation would thus be avoided. The Act, it was said, was so simply expressed that its meaning would be plain to any layman, and its provisions could be easily applied by lay tribunals. Unfortunately, however, the very simplicity of the language and the fact that expressions were not used in their familiar legal sense, made the Act most difficult to construe, and it is probable that no Act of Parliament has been the subject of so much litigation and has given rise to so many differences of judicial opinion.

After some amending Acts had been passed, the principal Act was repealed by the Workmen's Compensation Act of 1906, which re-enacted its main provisions with some amendments, and extended its benefits to classes of workmen not included in the operation of the earlier Acts.

The benefits of the Act of 1906 extend to every person who has entered into or works under a contract of service or apprenticeship (express or implied) with an employer, whether by way of manual labor, clerical labor, or otherwise, unless he is engaged otherwise than in manual labor at a remuneration exceeding £250 a year, excepting certain small groups such as the police, some casual workers, and workers who are members of the employer's family.

Like the Act of 1897, the Act of 1906 requires the employer to pay compensation on a scale having relation to the earnings of the workman whenever "in any employment personal injury by accident arising out of and in the course of the employment is cause to a workman", whereby he is disabled for at least one week from earning full wages at the work at which he was employed. The compensation normally takes the form of a weekly sum during the period of total or partial incapacity, not exceeding half the plaintiff's average earnings during the previous twelve months. The sum first awarded may be varied from time to time in accordance with the extent of the incapacity, and in cases of permanent disablement the weekly sum may be commuted for a lump sum. If death results from an accident, the workman's dependents are entitled to a sum of money proportioned to his earnings, but in no case exceeding £300.[22] All dis-

[22]Special provision is made for the calculation of average earnings in cases of difficulty, as where the employment has been irregular or has continued for less than a week. A good many difficult questions have arisen as to the proper mode of calculation in cases not exactly provided for.

putes are referred to an arbitrator who may be, and generally is, a County Court judge, and there is a right of appeal on questions of law to the Court of Appeal.

This Act does not merely extend the liability of a master in tort. It creates a new liability. The right to compensation is a statutory incident of the contract of service, by which the master is put to some extent in the position of an insurer against accident, except that the workman, the assured, does not pay any premium. Liability to pay compensation is in no way dependent on negligence or default by the master or any of his servants, nor is it any defense to a claim that the injury was caused by the claimant's negligence or disobedience to his master's orders.

The foundation of a claim for compensation is that the claimant has suffered "injury by accident arising out of and in the course of his employment". The injury must, therefore, fulfill three conditions: (1) It must be by accident; (2) it must arise out of the employment; (3) it must arise in the course of the employment. Each of these three expressions has been the subject of a vast amount of argument. Their meanings are now fairly well established, and one can explain them briefly as follows:

The leading cases on the question as to what is an "accident" are *Fenton* v. *Thorley & Co., Ltd.* [1903] A. C. 443, and *Trim Joint District School* v. *Kelly* [1914] A. C. 667. In the second of these cases it is pointed out by Lord Haldane that the fundamental conception of the Act is that of insurance in the true sense, and that meaning to be attached to the word "accident" in its context in such a scheme is the kind of event which is unlooked for and sudden. *Fenton* v. *Thorley,* Lord Macnaghten defined "accident" as used in the Act "in the ordinary and popular sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed;" and this definition has been generally accepted. Hence injury by accident may include mishaps caused by the negligence of the injured man as well as those for which no one is responsible. So in *Fenton* v. *Thorley,* an injury arising from an effort voluntarily made, to move a defective machine was held to be an injury by accident. An injury intentionally inflicted on himself by the injured man would of course not be an accident at all. It would be an event which was expected or designed.

Suppose, however, the injury is designedly caused by some person other than the injured man. From one view such an

event is not accidental; but from the point of view of the sufferer it may be. It is not designed or expected by him. In *Nisbet* v. *Rayne and Burn,* [1910] 2 K. B. 689, the Court of Appeal held that a cashier who was murdered by a robber had died from "injury by accident", although his death was clearly premeditated and intended by the murderer. This case was affirmed in principle in the *Trim Joint District School Case,* where the House of Lords, by a majority held that the death of a master of an industrial school caused by deliberate and intentional violence on the part of two inmates of the school was "an accident". Lord Haldane points out that when Lord Macnaghten spoke of a mishap being "not designed" he meant not designed by the sufferer. There is no necessary exclusion of what occurs by design from the category of injury by accident.

However the notion of accident implies something fortuitous, some mishap occurring at a definite time and place. Hence, we must exclude injuries to health or to the organs which result from mere wear and tear of work, such as injury to the eyesight from overstrain, or the gradual undermining of health from the nature of a man's occupation. We must also exclude definite illnesses even though directly caused by a man's employment, such as *enteritis* from breathing sewer gas.[23]

Nevertheless, wherever the plaintiff's incapacity is attributable to some mishap, he is said to have suffered the injury "by accident", even though the consequences are not such as would follow in the case of a man of ordinary strength or health, and are not the natural or probable results of the accident. Thus illness caused by an accident, such as a heart stroke or sun stroke, is injury by accident, even though the plaintiff's weak state of health rendered him particularly liable to such illness.[24] Death or incapacity from illness, which in fact results from an accident, even though it is not the natural or probable result of such accident, is therefore the subject of compensation, as when a man dies from blood poisoning which results from a neglected wound, accidently received in the course of his work.[25] The wound in such a case is an

[23]Eke *v.* Hart-Dyke [1910] 2 K. B. 677. Special provision is, however, now made for certain "industrial diseases" such as lead-poisoning, which were held not to be injuries by accident within the meaning of the Act of 1897.

[24]Ismay, Imrie & Co. *v.* Williamson [1908] A. C. 437.

[25]Ystradowen Colliery Co., Ltd. *v.* Griffiths [1909] 2 K. B. 533.

injury by accident, and the death or incapacity is the result, though only a remote result, of such injury.

If there were no qualification of the term "injury by accident" the master's liability to pay compensation would be co-extensive with that of an insurer under an accident policy. But the term is qualified by the two conditions that the injury must arise "out of" and "in the course of" the employment. It is now well established that the words "in the course of" refer to the time, place and circumstances in which the accident happens, and the words "arising out of" refer to its cause. The accident, though not necessarily the resulting personal injury, must occur during the time when the workman is engaged in his employment, and its cause or origin must have some connection with his employment.[26] Some common law cases[27] upon the liability of a master for his servant's negligence throw light on what is included in the course of employment; and from these and the many cases decided under the Act there emerge some broad principles. Generally speaking, a man is in the course of his employment not only while he is actually at work, but while he is at any place where he was required to be by the terms of his employment, before or after his actual working time and during cessation of work for a necessary purpose, or even in legitimate intervals of leisure.[28] But a man ceases to be in the course of his employment if he ceases to do his work and does something entirely for his own benefit, even during working hours and on his employer's premises. Generally, too, he ceases to be in the course of his employment, if he does some work different in kind from that which he is employed to do. But if, in an emergency, he goes outside his proper work, and to protect his master's interest does something quite outside the scope of his employment, he may, nevertheless, still be acting in the course of his employment. The best cases upon these points are *Sharp* v. *Johnson & Co., Ltd.* [1905] 2 K. B. 139; *Cremins* v. *Guest, Keen & Nettlefords, Ltd.* [1908] 1 K. B. 469; *Rees* v. *Thomas* [1899] 1 Q. B. 1015; *Reed* v. *Great Western Ry.* [1909] A. C. 31; *Low* v. *General Steam Fishing Co., Ltd.* [1909] A. C. 523; *Moore* v. *Manchester Liners, Ltd.* [1909] 1 K. B. 417.

[26] See Fitzgerald *v.* W. G. Clarke & Son [1908] 2 K. B. 796.

[27] See, for example, Storey *v.* Ashton (1869) L. R. 4 Q. B. *476.

[28] As in the case of a sailor, the whole of whose time on board ship is generally in the course of his employment.

The condition that the accident must "arise out of" the employment indicates that the cause of the accident must have some relation to the employment. When an accident is caused directly by the work a man is employed to do and is doing, or by the condition of the machinery, plant or premises, there is no difficulty in saying that it arises out of his employment. But many cases have occurred where the accident has been caused by some outside agency, such as an assault, the negligence of some person not connected with the employment, a bite from a cat or a dog, or some natural cause such as sun-stroke, frost-bite, or lightning. Accidents of these kinds which arise in the course of the employment do not necessarily arise out of it. The proper test to apply in these cases is whether the nature of the employment or the place where it is carried on involves more than ordinary risk of accidents of this kind. Thus in *Nisbet* v. *Rayne & Burn* [1910] 2 K. B. 689, the murder of the cashier was held to arise out of his employment because his being known to have a large sum of money about him involved him in more than ordinary risk of attack. But an assault by fellow workmen induced by mere personal animosity cannot be said to arise out of his employment.[29] So, too, injury from natural causes such as sun-stroke, lightning or the attacks of animals, does or does not arise out of the employment according to the place where the work is done, or the nature of the work, does or does not expose the workman to more than ordinary risk of such mishaps.

Where the employment involves such extraordinary risk the accident is considered as arising out of it, though it may not have any direct connection with it. There is no necessary connection between workmen on a high scaffolding and being struck by lightning. But a man in such a place is exposed to more than ordinary risk, and, if his work requires him to be in such a place his being struck is an accident arising out of his employment; though if a man in the course of doing precisely the same work in a less exposed place were struck his accident would not arise out of the employment.[30]

If it is once established that the plaintiff has been injured by an accident arising out of and in the course of his employment, and has been thereby disabled for one week from earning the same wages as before, his right to compensation is established.

[29]Fitzgerald *v.* W. G. Clarke & Son [1908] 2 K. B. 796.

[30]Andrew *v.* Falesworth Industrial Society, Ltd. [1904] 2 K. B. 32.

The only defence open to the master[31] is that the accident resulted from the serious and willful misconduct of the workman. This is a defence if the injury results only in temporary disablement, but not if it results in permanent disablement or death. Serious and willful misconduct has been construed strictly; a mere disobedience to rules, even though it may justify instant dismissal, or be the subject of penal proceedings, is not necessarily "serious and willful". The disobedience must be not only willful, but such that the consequences are likely to be serious.[32] The question whether there was serious willful misconduct is quite distinct from the question whether the accident arose out of and in the course of the employment. It cannot be said that merely because a man was disobeying orders he was acting outside of his employment.[33] "Serious and willful misconduct within the sphere of the employment does not prevent his dependence from claiming compensation, but willful misconduct outside the sphere of the employment does not bring the accident within the sphere of the employment."[34] If a man does something he is engaged to do, or something honestly believed to be in furtherance of what he is engaged to do, and in doing it, breaks rules or disobeys orders, an accident happening to him in such circumstances arises in the course of his employment. But if a man for his own advantage does something wholly different from what he is employed to do, he is outside the scope of his employment and cannot claim compensation, whether the disobedience is serious and willful or not.[35] However, the rule is easier to state than to apply in practice.

The first Workmen's Compensation Act only gave compensation for injuries or death by accident. But under the Act of 1906 compensation is also payable in the event of the workman's death or disablement by an industrial disease, *i. e.*, one of certain specified diseases to which workers in particular processes are peculiarly liable.[36] In working out this provision the disablement or a suspension from work is deemed to be an accident. Special legislation was required for these diseases, as they are not usually the result of accidents as that phrase has been interpreted by the courts.

[31]Except that he has contracted out of the Act.

[32]Johnson *v.* Marshall Sons & Co., Ltd. [1906] A. C. 409.

[33]Limpus *v.* London General Omnibus Co. (1862) 1 H. & C. *526.

[34]Harding *v.* Bryndder Colliery Co., Ltd. [1911] 2 K. B. 747, 751.

[35]See Weighill *v.* South Hetton Coal Co., Ltd. [1911] 2 K. B. 757; Barnes *v.* Nunnery Colliery Co., Ltd. [1912] A. C. 44.

[36]Such as poisoning by lead, arsenic, phosphorus or mercury, or anthrax contracted while handling wool or hides.

It is quite possible for a workman to be injured in such circumstances that he has a choice of remedies. If a person is injured, as in the case before suggested, by reason of a defect in the condition of the plant or machinery due to the personal negligence of the employer, he may bring an action either at common law or under the Employers' Liability Act, or may apply for compensation under the Workmen's Compensation Act. By taking the last course he avoids all risk of losing his action by the employer's establishing any common law defence, such as common employment or contributory negligence; but the compensation he recovers may be less than a jury would properly give him in an action. He can recover nothing for personal suffering, medical expenses, etc. Suppose, for instance, his injuries caused him great personal suffering and life-long disfigurement, or the loss of an eye or limb, nevertheless he may still be capable of returning to work in a few weeks and earning as much as before. In such a case, his compensation will be only a few pounds, calculated on his loss of earnings during the period of his incapacity, whereas a jury might properly award him a large sum as damages.[37] On the other hand, if a young man is injured and permanently incapacitated for life, the weekly sum he would get as compensation might be much better than such a sum as a jury would be likely to award.

When the cause of a workman's injury is such that he has a remedy at common law or under the Employers' Liability Act, or both, as well as under the Workmen's Compensation Act, he may pursue whichever remedy he pleases, but he cannot recover both damages and compensation. If he brings an action and fails, the court may make an award for compensation. But if he elects to claim compensation he cannot afterwards bring an action for damages.

It may sometimes happen too that his injury is caused under such circumstances that he has a remedy against some third person as well as grounds for claiming compensation from his master. In that case he may pursue both remedies, but cannot recover both damages and compensation. The master also, if compelled

[37]The Workmen's Compensation Act allows nothing for medical attendance, but this defect is partly remedied by the National Insurance Act of 1911, under which most workmen are compulsorily insured and by the provisions of which they are entitled to free medical and surgical attendance by doctors who undertake to give it for a fixed annual payment. The funds are provided partly by the state and partly by weekly contributions made compulsorily by workmen and employers.

to pay compensation, has a statutory cause of action for an indemnity against the third party. It should be added that the workman's right to contract himself out of his rights under the Act, and his competence to compromise claims are limited. There was and is nothing to prevent a workman from contracting out of the Employers' Liability Act, and many employers required their workmen to abandon their rights to bring actions in consideration of some other benefit.[38] But any contract by which a workman purports to abandon his rights under the Workmen's Compensation Act is void unless the master agrees to give him some not less favorable benefit under some scheme for compensation which is approved by the Registrar of Friendly Societies and by the majority of the workmen to whom it is applicable.

Though vast amounts have been spent in litigation under this Act, it must not be supposed that it is regarded as a failure. An immense number of claims for compensation have been paid without any proceedings or upon an award of a County Court Judge. And the number of appeals, though absolutely large, is not large in proportion to the number of claims. The amount of compensation paid under the Act during 1913 amounted to £3,361,650. When to this is added the costs of management, commission, legal and medical expenses, etc., it is estimated that the total charge borne by the industries cannot have been less than five million pounds. Compensation was paid in 3,748 cases of death and 476,920 cases of disablement.

That difficult points of law should arise under an Act which makes provision for the infinite variety of circumstances in which accidents happen is no matter of surprise. As time goes on the disputed points of law become settled and appeals become fewer. There have doubtless been, and will continue to be, many cases in which men have failed to get compensation in circumstances which seem to them indistinguishable from those in which, with no more or less merit, others have succeeded. But this must always be so until some system of universal insurance against accident is adopted—and perhaps even then there will be hard cases.

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[38] See Griffiths *v.* The Earl of Dudley (1882) 9 Q. B. D. 357; Clements *v.* London & North-Western Ry. [1894] 2 Q. B. 482.